

days prior to the effective date of such action.

(d) This section does not excuse a railroad from adopting, publishing and implementing the policies required by §§ 219.403 and 219.405 with respect to any group of covered employees not within the coverage of an appropriate alternate policy.

Subpart F—Pre-employment Tests

§ 219.501 Pre-employment tests.

(a)(1) Each Class I railroad (including the National Railroad Passenger Corporation) and each railroad providing commuter passenger service shall implement pre-employment alcohol testing beginning on January 1, 1995.

(2) Each Class II railroad shall implement pre-employment alcohol testing beginning on July 1, 1995.

(3) Each Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall implement pre-employment alcohol testing beginning on January 1, 1996.

(4) In the case of a railroad commencing operations after January 1, 1996, the railroad shall implement pre-employment alcohol testing not later than the expiration of 60 days from approval by the Administrator of the railroad's random testing programs.

(b) Prior to the first time a covered employee performs covered service for a railroad, the employee shall undergo testing for alcohol and drugs. No railroad shall allow a covered employee to perform covered service, unless the employee has been administered an alcohol test with a result indicating an alcohol concentration of less than .04 and has been administered a test for drugs with a result that did not indicate the misuse of controlled substances. This requirement shall apply to final applicants for employment and to employees seeking to transfer for the first time from non-covered service to duties involving covered service. If the test result of a final applicant for pre-employment indicates an alcohol content of .02 or greater, the provisions of paragraph (b) of this section shall apply.

(c) No final applicant for employment tested under the provisions of this part who is found to have an alco-

hol concentration of .02 or greater but less than .04 shall perform safety-sensitive functions for a railroad, nor shall a railroad permit the applicant to perform safety-sensitive functions, until the applicant's alcohol concentration measures less than .02.

(d) Tests shall be accomplished through breath analysis and analysis of urine samples. The conduct of breath alcohol testing and urine drug testing under this subpart is governed by subpart H of this part and part 40 of subtitle A of this title.

(e) As used in subpart H with respect to a test required under this subpart, the term *covered employee* includes an applicant for pre-employment testing only. In the case of an applicant who declines to be tested and withdraws the application for employment, no record shall be maintained of the declination.

(f) Notwithstanding any other provisions of this subpart, all provisions and requirements in this section pertaining to preemployment testing for alcohol are suspended as of May 10, 1995.

[59 FR 60564, Nov. 25, 1994, as amended at 60 FR 24766, May 10, 1995]

§ 219.503 Notification; records.

The railroad shall provide for medical review of the urine drug test results as provided in subpart H of this part. The railroad shall notify the applicant of the results of the urine and breath tests in the same manner as provided for employees in subpart H. Records shall be maintained confidentially and shall be retained in the same manner as required under subpart J for employee test records, except that such records need not reflect the identity of an applicant whose application for employment in covered service was denied.

[59 FR 7462, Feb. 15, 1994]

§ 219.505 Refusals.

An applicant who has refused to submit to pre-employment testing under this section shall not be employed in covered service based upon the application and examination with respect to which such refusal was made. This section does not create any right on the part of the applicant to have a subsequent application considered; nor does

it restrict the discretion of the railroad to entertain a subsequent application for employment from the same person.

[54 FR 53259, Dec. 27, 1989, as amended at 59 FR 7462, Feb. 15, 1994]

Subpart G—Random Alcohol and Drug Testing Programs

§ 219.601 Railroad random drug testing programs.

(a) *Submission.* Each railroad shall submit for FRA approval a random testing program meeting the requirements of this subpart. A Class I railroad (including the National Railroad Passenger Corporation) or a railroad providing commuter passenger service shall submit such a program not later than October 2, 1989. A Class II railroad shall submit such a program not later than April 2, 1990. A Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall submit such a program not later than July 2, 1990. A railroad commencing operations after the pertinent date specified in this paragraph shall submit such a program not later than 30 days prior to such commencement. The program shall be submitted to the Associate Administrator for Safety, FRA, for review and approval by the Administrator. If, after approval, a railroad desires to amend the random testing program implemented under this subpart, the railroad shall file with FRA a notice of such amendment at least 30 days prior to the intended effective date of such action. A program responsive to the requirements of this section or any amendment to the program shall not be implemented prior to approval.

(b) *Form of programs.* Random testing programs submitted by or on behalf of each railroad under this subpart shall meet the following criteria, and the railroad and its managers, supervisors, officials and other employees and agents shall conform to such criteria in implementing the program:

(1) Selection of covered employees for testing shall be made by a method employing objective, neutral criteria which ensure that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may

not permit subjective factors to play a role in selection, *i.e.*, no employee may be selected as the result of the exercise of discretion by the railroad. The selection method shall be capable of verification with respect to the randomness of the selection process, and any records necessary to document random selection shall be retained for not less than 24 months from the date upon which the particular samples were collected.

(2) The program shall select for testing a sufficient number of employees so that, during the first 12 months—

(i) The random testing program is spread reasonably through the 12-month period.

(ii) [Reserved]

During the subsequent 12-month period, the program shall select for testing a sufficient number of employees so that the number of tests conducted will equal at least 50 percent of the number of covered employees. Annualized percentage rates shall be determined by reference to the total number of covered employees employed by the railroad at the beginning of the particular twelve-month period or by an alternate method specified in the plan approved by the Associate Administrator for Safety. If the railroad conducts random testing through a consortium, the annual rate may be calculated for each individual employer or for the total number of covered employees subject to random testing by the consortium.

(3) Railroad random testing programs shall ensure to the maximum extent practicable that each employee shall perceive the possibility that a random test may be required on any day the employee reports for work.

(4) Notice of an employee's selection shall not be provided until the duty tour in which testing is to be conducted, and then only so far in advance as is reasonably necessary to ensure the employee's presence at the time and place set for testing.

(5) The program shall include testing procedures and safeguards, and procedures for action based on positive test results, consistent with this part.

(6) An employee shall be subject to testing only while on duty. Only employees who perform covered service